No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1941

SOUTHPORT PETROLEUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 40–45) is reported in 117 F. (2d) 90. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–20) are reported in 8 N. L. R. B. 792.

JURISDICTION

The decree of the court below (R. 52–54) was entered on February 26, 1941. A petition for rehearing (R. 47–52) was denied on February 1,

1941 (R. 52). The petition for a writ of certiorari was filed on May 1, 1941, and was granted on June 2, 1941, limited to the question of the correctness of the denial by the Circuit Court of Appeals of petitioner's application to that court for leave to adduce additional evidence before the Board (R. 54). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question presented is whether in the circumstances the Circuit Court of Appeals erred in denying petitioner's application for leave to adduce additional evidence before the Board to the effect that, subsequent to the issuance of the Board's order, petitioner declared a liquidating dividend, distributed all its assets including the oil refinery where the unfair labor practices occurred, and dissolved.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in the Appendix, *infra*, pp. 32–35.

STATEMENT

Upon the usual proceedings, the Board, on August 4, 1938, issued its findings of fact, conclusions of law, and order (R. 1–20). The Board found that in 1937 petitioner, a Texas corpora-

tion engaged at various places in refining crude oil and distributing gasoline and oil (R. 4–5), discharged three employees at its Texas City, Texas, oil refinery because of their membership and activity in Oil Workers International Union, Local No. 227, and that petitioner thereby violated Section 8 (1) and (3) of the Act (R. 9–15, 18).

The Board's order, in usual form, required petitioner, its officers, agents, successors, and assigns to cease and desist from discouraging membership in the Union or any other labor organization of its employees by discharging its employees or otherwise discriminating in regard to hire or tenure of employment, and from interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7. As affirmative action, the order directed that they offer reinstatement to the three employees discriminatorily discharged, pay each of them back pay from the date of his discharge to the date of offer of reinstatement, less his earnings during the period, and post notices at the refinery (R. 19–20).

On June 27, 1939, petitioner entered into a stipulation with a Board representative whereby petitioner agreed that, upon approval by the Board of the stipulation, petitioner, its officers, agents, successors, and assigns would cease and desist as provided in the Board's order, would offer reinstatement without back pay to the three discharged employees within ten days, and would post im-

mediately the notices required by the order (R. 21-23, 37). The stipulation further provided that such action would be considered full compliance with the Board's order, that petitioner, its officers, agents, successors, and assigns would not seek a review of the order, and that the Board would not seek enforcement of it unless petitioner failed to comply with the stipulation (R. 22–23). The stipulation was approved by the Board on July 21, 1939, and took effect on that day (R. 23).

On April 30, 1940, the Board filed in the court below a petition for enforcement of its order alleging, *inter alia,* that notwithstanding its repeated demands that petitioner carry out the terms of the stipulation, petitioner had failed to do so in any respect and had not acknowledged or otherwise replied to the Board's demands.[1] On August 21, 1940, nearly four months after the Board filed its petition, petitioner filed in the court below an application for leave to adduce addi-

[1] The petition for enforcement is set forth at pages 2–7 of the printed "Transcript of Record" in the court below, which has been filed with the Clerk of this Court, and which, by stipulation, constitutes part of the record herein (R. 54–55). Neither in its answer (R. 33–39) to the petition nor otherwise has petitioner denied the allegations as to its failure to comply with the stipulation or to reply to the Board's demands that it do so. The allegations included that on April 17, 1940, the Board notified petitioner by telegraph that the Board would deem the stipulation violated and would institute enforcement proceedings unless promptly advised that petitioner had complied, but that petitioner again failed to reply.

tional evidence before the Board (R. 24–26). The application alleged that on or about June 30, 1939 (which was three days after petitioner had executed the stipulation), petitioner discontinued all operations by declaring a liquidating dividend whereby it distributed all its assets among its four stockholders. The application further alleged that the two stockholders, Cornelius Kroll, petitioner's president and treasurer (R. 26, 38, 39), and G. G. Kroll, who received the Texas City refinery conveyed it to a newly organized Delaware corporation known as Southport Petroleum Company of Delaware, and that the stockholders of the Delaware corporation, which was presently operating the refinery, were at no time stockholders of petitioner. Petitioner prayed that it be permitted to prove these facts before the Board, and that, upon the evidence being made a part of the record, the court dismiss the proceeding (R. 24–26).

The Board filed a memorandum (R. 27–32) opposing the application and asking the court, if it did not thereupon deny the application, to postpone decision upon it until hearing the case on the merits. The memorandum did not admit or deny the events alleged by petitioner, but it pointed out that petitioner still was in existence as a corporation and that there was no allegation that it had been dissolved (R. 31). In addition, the Board called attention to petitioner's delay in seeking to adduce the additional evidence, and to

the indications of bad faith on its part shown by its conduct in entering into the compliance stipulation on the eve of discontinuing operations, and by its conduct thereafter in failing to reply to the Board's demands that it comply with the stipulation (R. 32).[2]

On November 14, 1940, while its application for leave to adduce evidence still was pending, petitioner filed an answer to the Board's petition for enforcement (R. 33–39). The answer alleged that, as evidenced by an attached copy of a certificate of dissolution signed by the Assistant Secretary of State of Texas (R. 39), petitioner formally was dissolved on October 16, 1940 (R. 33). Without waiving its application to adduce evidence, petitioner prayed that the proceeding be dismissed because of the dissolution (R. 33). In its answer petitioner also attacked the Board's findings and order upon evidentiary grounds (R. 34–38).

On January 4, 1941, the court handed down its opinion upholding the Board's order and, in effect, denying petitioner's application to adduce additional evidence and its motion to dismiss (R. 40–45).[3] A rehearing sought by petitioner (R.

[2] Petitioner did not allege and the record nowhere indicates that the alleged liquidation or discontinuance of operations was known to the Board prior to petitioner's filing of its application in the court below.

[3] The court did not expressly deny either the application or motion, but it considered the former in its opinion and

47–52) was denied on February 1, 1941 (R. 52). Thereafter, on February 26, 1941, the court entered its decree enforcing the Board's order (R. 52–54). This Court granted a writ of certiorari limited to the question whether the court below had acted correctly in denying the application to adduce additional evidence (R. 54).

SUMMARY OF ARGUMENT

Section 10 (e) of the Act authorizes either party in a proceeding for enforcement of a Board order to file in the circuit court of appeals an application for leave to adduce additional evidence before the Board. It provides that if the party shows to the satisfaction of the court that the evidence is material and that there were reasonable grounds for not having introduced it at the hearing before the Board, the court "may" grant the application. In the instant circumstances the court below did not abuse its discretion in denying petitioner's application.

A

1. The additional evidence which petitioner sought leave to adduce was to the effect that subsequent to the Board's order petitioner transferred all its assets to its stockholders and ceased doing business. Thereafter, as alleged in its

concluded that the alleged dissolution could have "no effect" upon the proceeding since, under the laws of Texas, petitioner was continued as a corporation for a period of three years for purposes of suing and being sued (R. 44–45).

answer, it was dissolved. In view of the intention of Congress to avoid delays in remedying unfair labor practices and in securing compliance with the Act, leave to prove such subsequent events, not going to the validity of the Board's order but simply to the question of the employer's ability to comply with it, should be granted only upon a clear showing of materiality, especially since inability to carry out the court's enforcement decree would be a complete defense in any contempt proceeding.

2. Petitioner failed to make the required showing. Petitioner was incorporated in Texas and under the laws of that State its corporate existence was continued for a period of three years for the purpose of settlement of its affairs. It could sue and be sued and judgments could be entered against it "as though the same (corporation) were not dissolved." Thus, even apart from the fact that the Board's order was directed against petitioner's officers, agents, successors and assigns, as well as against petitioner, the alleged events could not possibly have abated or rendered the case moot, and hence were not material to petitioner's prayer that upon proof of them the case should be dismissed. The absence of any possible abatement of the back-pay provision is especially clear.

3. Petitioner did not assert or attempt to show that its alleged additional evidence was material to the question whether the Board's order should be modified in any respects prior to enforcement.

Nor does any sufficient showing of such materiality appear from the face of its allegations. This is true as regards each of the provisions of the order. Properly construed, the reinstatement and posting of notice provisions were conditioned upon continued operation of the refinery where the unfair labor practices occurred, and, upon the facts alleged, would not, as petitioner suggests, require it to obtain another refinery or otherwise resume business. Petitioner does not contend that the new corporation alleged to be operating the refinery is not subject to the Board's order, nor would it have standing to do so. For aught that is alleged, the new corporation may well be bound by the order, in which event full enforcement could be in no respect idle.

B

Under Section 10 (e) of the Act the court had discretion to deny petitioner's application even assuming that the evidence sought to be adduced was not wholly immaterial. Accordingly, petitioner's unexplained and protracted course of conduct in not complying with the Board's order or with its stipulation of compliance during the long period prior to its alleged dissolution, and in not seeking to be relieved therefrom or to obtain a modification before the Board, furnishes an additional consideration showing that the court did not abuse its discretion in refusing to permit the further delay in enforcement which would have resulted from granting petitioner's application.

ARGUMENT

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

The court below held that the evidence as to the illegal discharges found by the Board was adequate to support the Board's findings and order (R. 41, 45). The petition for certiorari, insofar as it sought a review of this holding (Pet. 6, 12–13), was, in effect, denied, since the writ was limited to the question whether the court below properly denied petitioner's application for leave to adduce additional evidence (R. 54). Thus the validity of the Board's findings and order upon the record as made before the Board and certified to the court stands established.

It follows that the decree enforcing the Board's order should be affirmed unless error invalidating it was committed by the court below in denying the application to adduce additional evidence. We shall show that the court had discretion to deny the application and that in the circumstances its action was not an abuse, but was in accordance with the policy of the Act and entirely proper.

Section 10 (e) of the Act, so far as here pertinent, provides:

> * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is

> material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

Under these express provisions it was incumbent upon petitioner to satisfy the court that the evidence it sought to adduce was material and that there were reasonable grounds for its failure to have introduced it at the hearing before the Board. Even then the use of the word "may" instead of "shall" appears to have left the court with discretion to deny the application.

The court in its opinion indicated that the alleged additional evidence was deemed immaterial since, conceding that petitioner had been dissolved as alleged, its corporate existence under the laws of Texas nevertheless was continued for purposes of suing and being sued (R. 44–45). Whether or not the court's conclusion that the dissolution could have "no effect" upon the proceeding, if taken to mean more than that the case had not abated or become moot, be altogether accurate, need not be decided. For in any event petitioner did not make a sufficient showing to justify the further delay in enforcement of the order which would have resulted from granting its application.

A. THERE WAS NO SUFFICIENT SHOWING THAT THE ALLEGED ADDITIONAL EVIDENCE WAS MATERIAL

1. The Act requires a clear showing of materiality to prove facts occurring subsequent to the Board's order relating to matters of compliance

By its application (R. 24–26) petitioner sought leave to prove, in substance, that some 11 months subsequent to the issuance of the Board's order and some 3 days subsequent to entering into the stipulation that petitioner, its officers, agents, successors, and assigns would comply with the order, except the back pay provision (R. 21–23), petitioner distributed all of its assets among its four stockholders; that Cornelius Kroll, petitioner's president and treasurer (R. 26, 38, 39), and G. G. Kroll were the stockholders who received the Texas City refinery where the three men illegally discharged had been employed; that they in turn transferred the refinery to a newly organized Delaware corporation called Southport Petroleum Company of Delaware, none of whose stockholders had owned stock in petitioner; that the latter company was operating the refinery; and that petitioner no longer operated any refinery, engaged in any active business, or owned any assets.

Thus the additional evidence which petitioner desired to introduce was in no way relevant to the question which normally is the sole issue before the reviewing court, namely, whether the Board's order was "lawful when made." See *National Labor Relations Board* v. *Pennsylvania*

Greyhound Lines, Inc., 303 U. S. 261, 271. It related exclusively to events occurring after the Board had made its order and was designed to support the prayer that the case be dismissed because of petitioner's alleged inability to comply with the order (R. 26).

We do not claim that evidence as to events occurring subsequent to a Board order may never be considered "material" within the meaning of Section 10 (e). On the contrary we may assume that there are cases in which such events might render the case moot or affect the propriety of entering an enforcement decree in the terms of the Board's order or any decree at all.[4] But for reasons which we state by way of introduction to our more specific contentions, we think an application to adduce evidence of such events should not be lightly granted prior to the entry of an enforcement decree.

In Section 10 (i) of the Act[5] Congress made

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[4] Cf. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 198 (C. C. A. 9); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 664 (C. C. A. 9); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 478 (C. C. A. 10), modified in other respects, 313 U. S. 212.

[5] Section 10 (i) reads as follows: "Petitions [for enforcement or review] filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

plain its intention that enforcement proceedings should be determined expeditiously by the courts. The legislative history further shows that the Act was designed to preclude delays which would defeat the speedy remedying of unfair labor practices found by the Board.[6] Since a contempt proceeding may be brought only for violation of a court's enforcement decree and since it is the sole effective sanction in compelling compliance (Note (1940) 53 Harv. L. Rev. 472, 473), entry of the decree should not be postponed by remands to the Board except in cases where the circumstances reveal a clear necessity for such action.

Especially should this be true in cases like the instant one where the evidence sought to be adduced concerns only the employer's continued ability to comply with the order as properly construed. Such questions ordinarily should be, and are, left

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[6] The Conference Report on the bill which became the Act (H. Rep. 1371, 74th Cong., 1st Sess., p. 5) stated that the purpose of not requiring a showing of disobedience of the Board's order as a condition to an enforcement proceeding under Section 10 (e) was to avoid delays such as had occurred in cases under the Federal Trade Commission Act where some circuit courts of appeals had required a showing of present disobedience of the order before considering the order on the merits and entering an enforcement decree. The Report states (*ibid.*): "The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. * * * If such [unlawful] practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings."

to adjustment by agreement between the parties or by supplemental proceedings after the validity of the order has been determined and enforcement has been decreed.[7] If employers were entitled to have them resolved in the manner attempted by petitioner, the Act would "not be workable." Compare *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 33 (App. D. C.), affirmed, 311 U. S. 72. In many instances proper enforcement might be delayed indefinitely. For it is inevitable that some changes will occur in the operation of a business during the period between issuance of the Board's order and ultimate enforcement by the court and that such changes will often lend themselves to allegations that the employer no longer can comply with the order as written.

The contention that nevertheless an employer should not be subjected to the threat of a contempt proceeding when unable to do what the order requires or when uncertain as to its true scope is, upon examination, more formal than substan-

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[7] See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 421–422 (C. C. A. 2); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194, 196 (C. C. A. 9); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 197–198 (C. C. A. 9).

tial. Only the Board could institute a contempt proceeding (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261) and it is not to be supposed that it would do so where through no fault of the employer compliance had become an impossibility. Moreover, if such a proceeding were brought, the employer would have a complete defense.[8]

In a contempt proceeding brought by the Board in another case, the court below upheld the employer's defense that the decree against it was ambiguous and incapable of being obeyed. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2d) 405 (C. C. A. 5), rehearing denied 99 F. (2d) 56. Other courts have held that extenuating circumstances amounting to less than inability to comply constituted a good defense. *National Labor Relations Board* v. *Federal Bearings Co., Inc.*, 109 F. (2d) 945 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. (2d) 195 (C. C. A. 2); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 108 F. (2d) 188 (C. C. A. 9); *National Labor Relations Board*

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[8] See *Oriel* v. *Russell*, 278 U. S. 358, 364, 365–366; *In re Sobol*, 242 Fed. 487, 489 (C. C. A. 2); *In re Byrd Coal Co.*, 83 F. (2d) 256 (C. C. A. 2); *United States* v. *Jaeger*, 117 F. (2d) 483, 488 (C. C. A. 2); Rapalje, *Contempts*, Secs. 129, 137. Many additional cases to the effect that bona fide inability to comply constitutes a good defense are collected in notes in 22 A. L. R. 1256; 31 A. L. R. 649; 40 A. L. R. 546; 76 A. L. R. 390; 120 A. L. R. 703.

v. *Arcade Sunshine Co.*, decided November 10, 1941 (App. D. C.) (not yet reported).

In the light of these considerations, we think it evident that petitioner did not sufficiently show that there was any occasion for its application to be granted. We show first that, judging by any standard, the alleged additional evidence could not have abated or rendered the case moot.

2. Proof of petitioner's alleged discontinuation of business and dissolution would not have abated or rendered the case moot.

In its application petitioner did not contend that the alleged events which it sought to prove were material in the sense that they should result in a modification of particular provisions of the order. It maintained instead that by reason of its discontinuation of business "it would not be practical for the Court to enter any order" against it, and that the entire proceeding should be dismissed "because the respondent (petitioner) cannot reinstate any employees and cannot carry out any other orders of the Board * * *" (R. 25, 26). Thus petitioner's position was, in substance, that the case was moot or had abated because of petitioner's inability to comply with any provision of the Board's order. This likewise appears to have been petitioner's stand in its answer to the petition for enforcement, wherein it alleged that it had been formally dissolved subsequent to the filing of its application

to adduce evidence and moved for a dismissal of the proceeding on that ground (R. 33).

However, under the laws of Texas, where petitioner was incorporated, a corporation upon dissolution is continued in existence for three years for the purpose of enabling its affairs to be settled. Vernon's Annotated Texas Statutes (Civil Statutes), Vol. 3, Art. 1389 (Appendix, *infra*, p. 35). Unless a receiver is appointed, the president and directors or managers of the corporation at the time of its dissolution are declared to be trustees of the creditors and stockholders, and are empowered, *inter alia*, to distribute the assets "after paying the debts due and owing by such corporation at the time of its dissolution" and to "maintain or defend judicial proceedings" in the name of the corporation. *Id.*, Art. 1388 (Appendix, *infra*, pp. 34–35). In addition, it is specified that the dissolution shall not abate any pending suit against the corporation, but that "such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved." *Id.*, Art. 1390 (Appendix, *infra*, p. 35).

These provisions foreclose any contention that the additional evidence which petitioner sought to adduce was material to the object for which it was offered, namely, the securing of a dismissal. This is particularly evident in view of the fact that the Board's order (R. 19–20) was directed not only to

petitioner but to its "officers, agents, successors, and assigns" (see *infra*, pp. 21–23, 25–27), and included a provision requiring the payment of back wages to the three employees unlawfully discharged. As regards the back-pay provision, the alleged dissolution was as clearly ineffectual to avoid enforcement as it would have been to avoid judgments in suits by creditors for the collection of outstanding debts.[9] The decisions holding dissolved Texas corporations liable in such suits are numerous.[10] If, as alleged, petitioner was without assets, having distributed them among its stockholders, collection could be had against the latter or their transferees-with-notice to the extent of the assets received. *National Bank of Jefferson* v. *Texas Investment Co.*, 74 Tex. 421, 436–438;

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[9] Cf. *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609 (C. C. A. 8), pending on petition for certiorari, No. 739, this Term, in which the court held that upon the adjudication of the employer as a bankrupt, a back pay award made under the National Labor Relations Act was provable against the estate in bankruptcy. The court said: "The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back pay award under the Act is satisfied" (p. 612).

[10] E. g. *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273 (dissolution of Texas corporation pending appeal); *Lyon-Gray Lumber Co.* v. *Gibralter Life Ins. Co.*, 269 S. W. 80 (Tex. Sup. Ct.); *Butcher* v. *J. I. Case Threshing Machine Co.*, 207 S. W. 980 (Tex. Civ. App.); *Becker* v. *Cooper* 22 S. W. (2d) 1083 (Tex. Civ. App.). Cf. *Ewen* v. *American Fidelity Co.*, 261 U. S. 322; *Clark* v. *Williard*, 292 U. S. 112; *Burkburnett Refining Co.* v. *Ilseng*, 116 Tex. 366.

Panhandle National Bank v. *Emery*, 78 Tex. 498, 505; *Pourifoy* v. *Wiebusch*, 132 Tex. 36, 41–42; *Clevenger* v. *Galloway & Garrison*, 104 S. W. 914, 916 (Tex. Civ App.), writ of error denied by Tex. Sup. Ct. (*ibid.*). Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 592, 603; *Pierce* v. *United States*, 255 U. S. 398.

3. There was no sufficient showing that the alleged additional evidence was material to the propriety of enforcing the Board's order without modification

Since the alleged additional evidence would not have established that the case should be dismissed, it was material, if at all, only to the question whether any of the particular provisions of the order should be modified or deleted prior to enforcement. However, petitioner in its application did not attempt to show the court the respects in which the evidence might be material in that sense; it did not urge any modification of the order. Moreover, no sufficient showing of materiality appeared from the face of the allegations. We will demonstrate this in relation to each of the provisions of the Board's order.

Cease and desist provisions (R. 19): Paragraph 1 of the Board's order directed petitioner, its officers, agents, successors, and assigns to cease and desist from discrimination in regard to hire or tenure of employment, and from interference with exercise of the rights guaranteed to em-

ployees in Section 7 of the Act. Petitioner's alleged discontinuation of business and dissolution did not render enforcement of these provisions unnecessary or improper.

It may be, and there is no allegation to the contrary, that employees were retained or hired or at least might be hired by the liquidating trustees in settling the affairs of petitioner pursuant to the Texas laws already cited (*supra*, p. 18). If so, they were entitled to be protected against a recurrence of petitioner's unfair labor practices, however unlikely such a recurrence may have seemed and whether or not the practices had been discontinued. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 270. On the other hand, if petitioner had no employees and would have none in the future, it could not violate the cease and desist provisions and could not be aggrieved by enforcement.

Furthermore, petitioner made no allegations concerning the propriety of enforcement as against its officers, agents, successors, and assigns. Nor would it have standing to complain of the order or its enforcement as against them. Cf.

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515, 558; *National Labor Relations Board* v. *Blackstone Manufacturing Co.*, decided November 17, 1941 (C. C. A. 2) (not yet reported). Moreover, enforcement against them was proper. The "officers, agents, successors, and assigns" provision is customary in Board orders [11] and, as is true of similar provisions in equity decrees, it is valid, notwithstanding that the persons or firms who may be covered by it are unknown or nonexistent at the time of issuance. Cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 119–120; *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); cf. *National Labor Relations Board* v. *Blackstone Manufacturing Co.*, *supra*.

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[11] This Court has repeatedly enforced Board orders containing the provision, *e.g.*, *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, enforcing as modified 4 N. L. R. B. 71, 108; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, enforcing as modified and remanding 19 N. L. R. B. 547, 603.

In cases arising under the antitrust laws and other statutes which protect public rights, as does the National Labor Relations Act (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–268; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363), the lower federal courts have often held that dissolution of a defendant corporation or association during the pendency of the action does not bar the entry of an injunction against its officers, agents, successors, or assigns, or, in some instances, against it.[11] Compare *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 304–305, 307–310; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 552, and cases there cited; *American Tobacco Co.* v. *Federal Trade Commission*, 9 F. (2d) 570, 575–576 (C. C. A. 2), affirmed on other grounds, 274 U. S. 543.

Reinstatement provisions (R. 19): Paragraph 2 (a) of the Board's order directs that offers of

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[11] *Bohlmer* v. *Louisville & N. R. Co.*, 83 Fed. 898, 902–904 (C. C. A. 4), reversed on other grounds, 175 U. S. 648; *Securities and Exchange Commission* v. *Universal Service Assn.*, 106 F. (2d) 232, 235, 239–240 (C. C. A. 7), certiorari denied, 308 U. S. 622; *Interstate Commerce Commission* v. *Western New York & P. R. Co.*, 82 Fed. 192, 194 (C. C. W. D. Pa.); *United States* v. *Bates Valve Bag Corp.*, 39 F. (2d) 162, 164–165 (D. Del.); *Securities and Exchange Commission* v. *Lawson*, 24 F. Supp. 360, 364–365 (D. Md.); *Beaumont S. L. & W. Ry. Co.* v. *United States*, 36 F. (2d) 789, 800 (W. D. Mo.), affirmed 282 U. S. 74.

reinstatement to their former positions be made to the three employees found to have been discharged illegaliy. As is true of the other provisions of the order, there is no question that this provision was valid when made and that petitioner could have complied with it at any time during the period of 11 months intervening the order and the alleged liquidation. Indeed, petitioner stipulated that it would make the offers of reinstatement (R. 22).

In its application to adduce evidence petitioner alleged that by reason of its distribution of assets and discontinuation of business it could not reinstate any employees (R. 26). Thereafter in its petition for rehearing in the court below (R. 49) and petition for certiorari in this Court (Pet. 6, 7, 9–10), petitioner maintained that it could not do so unless, as it suggested, the order required it to purchase and operate another refinery or otherwise resume business. Properly construed (cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117–118), the order contains no such requirement. Its purpose was to remedy petitioner's violations of the Act by restoring the status quo as it existed prior to the violations, but only to the extent possible under the circumstances existing at the time of compliance, assuming that the circumstances were not changed through any bad faith on petitioner's part. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. (2d) 195, 196–197 (C. C. A. 2).

That the men were to be offered reinstatement "to their former positions" (R. 19) is express indication that the reinstatement provision was contingent upon continued operation of the Texas City refinery. This likewise appears to have been true of paragraph 2 (c) of the order requiring the posting of notices "at its Texas City, Texas, refinery" (R. 20).

It follows from the foregoing interpretation that if the application to adduce evidence had been granted and had resulted in exempting petitioner from the reinstatement provision so long as in good faith it could not reinstate the employees, petitioner would be in no better position than it is now. As regards the instant paragraph of the order, therefore, a remand to the Board could have served no purpose other than a possible resolution of the question whether Southport Petroleum Company of Delaware, which was alleged to be operating the refinery (R. 25), was a successor or assign of the petitioner within the meaning of the Board's order and required as such to offer reinstatement to the employees. But that question, while interesting, neither could have been raised by petitioner, nor was it. *Supra*, pp. 21–22.

Moreover, even if petitioner had contended that the order should not be enforced as against its officers, agents, successors, or assigns, and had standing to do so, its allegations would not have warranted a remand. There is no allegation as to

the reason for the transfer of the refinery from petitioner to two of its stockholders and from them to the new corporation. Nor is there any allegation as to whether the new corporation assumed the obligations of petitioner, or took with notice of the outstanding Board order. Thus, for aught that appears, the new corporation may well be obligated to comply with the order, including the affirmative provisions not carried out by petitioner.[13]

It is indeed arguable that even if the new corporation were assumed not to have acquired the refinery for purposes of evading the Board's order, and not to have assumed petitioner's obligations, it should nevertheless be required to reinstate the employees, especially if, as is probable, it had notice of the order. Petitioner's obligation to

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[13] *National Bank of Jefferson* v. *Texas Investment Co.*, 74 Tex. 421, 436 (assignee assuming obligations held liable); *Panhandle National Bank* v. *Emery*, 78 Tex. 498, 505 (*id.*); *National Labor Relations Board* v. *Hopwood Retining Co.*, 98 F. (2d) 97 (C. C. A. 2), on contempt, 104 F. (2d) 302 (successor required to comply when acting as agent in avoidance of Board's order); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 594–595 (C. C. A. 3) (successor required to comply); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6) (*id.*); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574 (C. C. A. 7), certiorari denied, No. 261, this Term (successor receiver held liable for predecessor's unfair labor practices); cf. *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.); *Pierce* v. *United States*, 255 U. S. 398. See also the cases cited *supra*, pp. 19–20.

comply with the Board's order and to reinstate the men became fixed when the Board made its order (*National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541–542 (C. C. A. 9), certiorari denied, 306 U. S. 646), and had petitioner reinstated them when it admittedly could have, they presumably would have remained in their jobs when the refinery was transferred. Their employee status was continued by the Act (Section 2 (3)), and the view is reasonable that since the refinery continued to be operated as a going concern, the illegally discharged men were entitled to their jobs regardless of the alleged change in ownership. As was recognized in *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6), where a Board order against a partnership was enforced against a surviving partner, both the Act and the Board's orders are designed to regulate not only the entity which committed the unfair labor practices, but what the court termed the "employing industry." A narrower view, which would deny illegally discharged employees the jobs they presumably would have continued to hold had they not exercised the rights guaranteed by the Act, would subvert the legislative policy expressed in Section 1 to protect and foster "the right of employees to organize" and the "practice and procedure of collective bargaining."

Back pay provisions (R. 19–20): The ineffectiveness of petitioner's alleged dissolution to

relieve it of the obligation to reimburse its discharged employees pursuant to paragraph 2 (b) of the Board's order has already been indicated. *Supra*, pp. 19–20.

The additional evidence, if at all material to this paragraph of the order, would have been pertinent only with respect to the date to which the back pay should run.[14] The date specified in the order is the date of the offers of reinstatement (R. 20). If, as alleged, petitioner could not make such offers after its liquidation, the date, as against petitioner, if not its successors, properly would be the last day when it could have made them. Cf. *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661, 664 (C. C. A. 9). But there was no occasion for granting its application merely to ascertain that date. Questions concerning the amount of back pay due under Board orders arise in almost every case and, at

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[14] Petitioner has hitherto contended (R. 5[1]; Pet. 7, 11–12), citing *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646, that since it could not offer reinstatement to its employees, the back pay provision was invalid as beyond the Board's power. However, the Board's power to order back pay without reinstatement was expressly sustained in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 205–206 (C. C. A. 2), and the decision on the point was affirmed by this Court without specific discussion thereof (313 U. S. 177, 200). See page 8 of our brief in opposition to the petition for certiorari herein. See also *National Labor Relations Board* v. *Hearst*, *supra*; *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609, 613 (C. C. A. 8), pending on petition for certiorari, No. 739, this Term.

least in the first instance, are dealt with more appropriately by adjustment between the parties than they could be through the time-consuming method of formal proceeding. Indeed, except in cases where the offers of reinstatement are made prior to the close of the proceeding, the precise amount of back pay ultimately to be due can never be determined therein.[15]

Posting of notice provision (R. 20): Paragraph 2 (c) of the order, as aforementioned, directed that notices be posted at petitioner's Texas City refinery stating that it would cease and desist in the manner required by paragraph 1. What has been said (*supra*, pp. 23–27) as regards the reinstatement provision is similarly applicable to this, so that we need add nothing further.

B. PETITIONER'S COURSE OF CONDUCT PRIOR TO FILING ITS APPLICATION ADDITIONALLY JUSTIFIES THE COURT'S EXERCISE OF DISCRETION IN DENYING THE APPLICATION

The considerations which we have set out in Point A are alone sufficient, we think, to establish

[15] The cases hold that the failure of the order to set forth the amount of back pay due does not bar enforcement. *National Labor Relations Board* v. *Fashion Piece Dye Works*, 100 F. (2d) 304, 305–506 (C. C. A. 3); *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 963 (C. C. A. 4); *Mexia Textile Mills* v. *National Labor Relations Board*, 110 F. (2d) 565 (C. C. A. 5) (*sub silentio*); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 539, 542–543 (C. C. A. 9), certiorari denied, 306 U. S. 646.

that the court did not err in denying petitioner's application. There is, however, an additional consideration supporting the court's action.

Under Section 10 (e) the court had discretion to deny the application even if the additional evidence sought to be adduced was not wholly immaterial. *Supra*, pp. 10–11. A factor which seems pertinent to the question whether, assuming that view of the evidence, the court abused its discretion, is afforded by petitioner's unexplained and protracted course of conduct prior to the filing of its application. In the circumstances, this was such, we believe, as should preclude any holding that petitioner was entitled to the further delay in enforcement which would have resulted if the court had exercised its discretion differently.

In the first place, petitioner had ample time to comply with the Board's order during the period of eleven months intervening issuance of the order and petitioner's alleged liquidation. Yet without any meritorious excuse, it failed to do so. Nor did it file a petition for a review of the order as permitted by Section 10 (f). Moreover, although the liquidation was alleged to have occurred some ten months prior to the Board's filing of its petition for enforcement (R. 24–26), petitioner assigned no reasons for its failure to further prompt disposition of the cause by applying to the Board during that period to reopen the proceeding for proof of the alleged events or to be relieved from comply-

ing with the order or the stipulation for compliance. Finally, petitioner at no time explained its conduct in entering into the stipulation on the eve of its alleged liquidation and in not even replying thereafter to the Board's communications attempting to secure compliance.

Having avoided compliance with the Board's order in the manner thus summarized, petitioner is not in a position now to complain that the court abused its discretion.

CONCLUSION

For the foregoing reasons we respectfully submit that the court below did not abuse its discretion, and that petitioner's application to adduce additional evidence was properly denied. The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the

employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 10. * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals * * * for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court * * * shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the

transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

* * * * *

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

Vernon's Annotated Texas Statutes (Civil Statutes) Vol. 3:

Art. 1388. Liquidation by officers.—Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders

of such corporation to the extent of its property and effects that shall have come into their hands.

Art. 1389. Extension of existence.—The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty, to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

Art. 1390. Effect of dissolution.—The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved.

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